

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

FILED  
25 FEB 04 AM 10:21

SAM FRESQUEZ,  
Plaintiff,

MEMORANDUM DECISION AND  
ORDER DENYING REMAINDER  
OF DEFENDANT'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT; DENYING  
DEFENDANT'S REQUEST TO  
FILE A SUBSTITUTE  
MEMORANDUM; AND GRANTING  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
ON LIABILITY

vs.

NATIONAL RAILROAD PASSENGER  
CORPORATION d/b/a AMTRAK,  
Defendant.

Case No. 2:02-CV-1166 TS

This matter is before the court for consideration of the reserved portions of Defendant's Cross-Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment.

I. PROCEDURAL BACKGROUND

This is a personal injury case brought by plaintiff Sam Fresquez, a locomotive engineer, against defendant Amtrak under FELA (Federal Employer's Liability Action). On

25

August 5, 2002, while this case was pending in the District of Colorado, Plaintiff filed a Motion for Partial Summary Judgment on liability. On August 7, 2002, Amtrak responded with a Motion to transfer the case to this District. On August 13, 2002, Amtrak filed a Cross-Motion for Summary Judgment asserting that the primary duty rule bars Plaintiff's claim and, the same day, filed its Response to Plaintiff's Motion for Summary Judgment, raising a challenge to the constitutionality of § 54a of FELA.

On October 15, 2002, Defendant was successful in transferring this case to the District of Utah. By Order entered on July 18, 2003, this court held that the primary duty rule does not apply in FELA cases and therefore denied, in part, Amtrak's Cross-Motion. Amtrak's raising of a constitutional challenge to a federal statute, 45 U.S.C. § 54a, required that the Attorney General be notified of the pending constitutional challenge and the United States be given an opportunity to intervene. 28 U.S.C. § 2403. Accordingly, the court reserved ruling on the constitutionality question asserted in the pending motions until after the United States had been afforded the required notice and opportunity to intervene. Ruling on the matter was delayed by an inadvertent failure to serve the Notice on the United States. Service was effected on December 10, 2003. The court afforded the United States a 60-day period in which to exercise its opportunity to respond. The United States has not intervened.

## II. DEFENDANT'S REQUEST

On February 20, 2004, Defendant filed a Request for Leave of Court to File a Substitute Memorandum Pertaining to the Inapplicability of 49 U.S.C. § 53 and 54a and 49

C.F.R. § 240.305(a)(1) Upon the Facts of this Case (Request). The Request withdraws Defendant's contention regarding unconstitutionality—the legal issue that has delayed resolution of the motions. The Request seeks leave to file a new memorandum raising two new arguments opposing Plaintiff's Motion for Partial Summary Judgment on liability. The filing of the Request was made on a Friday afternoon, shortly before a hearing scheduled for the following Thursday, February 26, 2004. Plaintiff's counsel does not object to the substitute brief.

Having considered the entire file in this case, the court will not grant Defendant's Request to file what it admits are two new positions for opposing Plaintiff's Motion for Partial Summary Judgment only four business days before the Motion was to be resolved. Defendant states no reason for its request other than it determined it should withdraw its claim of constitutionality.

This case has been long delayed by the Defendant's now-withdrawn challenge to constitutionality of the statute. The court has already ruled on the motions, reserving only the constitutionality issue. This court will not permit a new round of delay based upon new arguments that could have, or should have, been made in opposition to Plaintiff's Motion for Partial Summary Judgment no later than the July 18, 2003, Order that denied in part Defendants' Cross Motion for Summary Judgment and reserved ruling on the remainder of the Motions. The court will not countenance such a dismaying litigation tactic. Therefore, the court will proceed to determine the motions.

### III. SUMMARY JUDGMENT MOTIONS

The court has set forth the factual background of this case and the text of the pertinent statutes and regulations in its previous order and will not repeat them here.

The standard for considering summary judgment motions is as follows:

"When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1007 (10<sup>th</sup> Cir. 2001). Summary judgment is appropriate only if the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To successfully oppose summary judgment, the nonmoving party must show that there is a "genuine" issue of fact, which requires "more than simply showing that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

*Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1146 (10th Cir. 2001).

Plaintiff contends that Amtrak's employee, Mr. McMillen, who was operating the train, failed to follow the federal regulation regarding stopping for the red signal, 49 C.F.R. § 240.305(a)(1). Section 54a of FELA, 45 U.S.C. § 54a, deems such federal regulations to be a "statute" under FELA's § 53. Section 53 provides that if the railroad's violation of any "statute enacted for the safety of employees contributed to the injury of such employee," then no finding of contributory negligence shall be imposed on the injured employee. Thus, where the railroad violates a safety statute or regulation, the contributory negligence standard otherwise applicable under FELA is replaced by a simple finding of

negligence on the part of the railroad. Therefore, Plaintiff contends that these statutes prevent his own alleged negligence in connection with the accident from being considered and seeks partial summary judgment on the issue of liability.

In support of his Motion for Partial Summary Judgment, Plaintiff presented evidence that Amtrak, through its employee McMillen, violated a safety rule deemed to be statute within the meaning of § 53. Defendant having failed to show that there is an issue of fact on that violation, Plaintiff is entitled to judgment as a matter of law that defendant Amtrak was negligent and that § 53 therefore precludes his own alleged contributory negligence from being considered in awarding damages.

#### VI. ORDER

Based on the forgoing, it is therefore

ORDERED that Amtrak's Cross-Motion for Summary Judgment is DENIED. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment on Liability is GRANTED.

DATED this 25<sup>th</sup> day of February, 2004.

BY THE COURT:

  
\_\_\_\_\_  
TED STEWART  
United States District Judge

United States District Court  
for the  
District of Utah  
February 25, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-01166

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. E Scott Savage, Esq.  
BERMAN TOMSIC & SAVAGE  
50 S MAIN STE 1250  
SALT LAKE CITY, UT 84144  
EMAIL

Brent O. Hatch, Esq.  
HATCH JAMES & DODGE  
10 W BROADWAY STE 400  
SALT LAKE CITY, UT 84101  
EMAIL

Bristol Baxley, Esq.  
ROME ARATA & BAXLEY  
1506 E BROADWAY STE 103  
PEARLAND, TX 77581